

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED

JAN 06 2020

David J. Bradley, Clerk of Court

JOHN SAIN, et al.,

Plaintiffs,

v.

BRYAN COLLIER, et al.,

Defendants.

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§

CIVIL ACTION NO.
4:18-cv-04412

RESPONSE TO ORDER TO SHOW CAUSE FOR STAY PENDING APPEAL

TO THE HONORABLE JUDGE OF SAID COURT...

Comes now, Plaintiffs in the above styled and numbered civil action pursuant to the Court's Order to show cause why the District Court proceedings should be stayed pending a decision on Plaintiffs' Appeal from the Court's Memorandum Opinion and Order issued on August 30, 2019. *See*: Doc. 131, p.7, para. 13

Plaintiffs provide Notice to the Court that they have filed a motion in the Fifth Circuit requesting that the Court to stay the appellate proceedings until after the entry of the final judgement in the District Court. *See*: Copy of Motion, Attachment A.

Plaintiffs offer their sincere apologies to the Honorable Court for prematurely filing their Notice of Appeal. Plaintiffs beg the Court's forgiveness and assure the Court that the error was not in bad faith, but rather a by-product of Plaintiffs' inexperience and lack of knowledge. Combined with the problems which continue to escalate in the Luther Unit Law Library. Plaintiffs requests for additional law library sessions are being denied by the Access to Courts Supervisor who cites

to a per se rule that they are permitted 10 hours a week access to the law library with an additional 30 minutes per day of extra time for a total of 12.5 hours maximum time allowed per week. No consideration is being given to their filing deadlines, the complexity of their case, or their need to confer with each other.

Additionally, the Defendants relocated Plaintiffs to the Pack Unit on October 30, 2019. This in itself was very disrupting to continuing legal work, especially since their in-process work remains at the Luther Unit and a method of transfer of these documents from the Inmate Legal Assistants has not been devised. *See*: Doc. 145.

Since Plaintiffs relocated to Pack, production of legal work has come to a near stand-still as lack of in-progress work, Inmate Legal Assistants, their ability of the Plaintiffs to confer and work together is not possible, and as noted above about the Luther Unit, First Amendment Rights are more restricted and violated than prior to relocation.

These conditions recently imposed by the Defendants are severely hindering Plaintiffs' ability to conduct research for the applicable case references, Codes and Rules prior to having to timely file.

Wherefore, Plaintiffs pray there will be no need to delay the proceedings in case No 4:18-cv-04412. The filing deadline for this response is Nov. 6, 2019. Plaintiffs humbly request the Court to await the Fifth Circuit's decision on their Motion before requiring them to show cause. See attached, Appellants' Motion Requesting The Court Stay Further Processing In Appeal, filed with the U.S.C.A. Clerk. *See*: Attachment A.

Respectfully Submitted,

Dated: January 6, 2020

CERTIFICATE OF CONFERENCE

Whereby their signatures below, Plaintiffs do hereby certify/declare that a conference is not possible because Plaintiffs are incarcerated in Texas Department of Criminal Justice, Institutional Division, and are proceeding Pro Se in this cause. Plaintiffs will not speculate on whether the Defendants oppose this motion.

CERTIFICATE OF SERVICE

Whereby their signatures below, Plaintiffs do hereby certify/declare that true and correct copies of the foregoing document was forwarded via U.S. First Class Mail, postage pre-paid, to the following parties:

- a. Bryan Collier
TDCJ Executive Director
Texas Department of Criminal Justice
- b. James McKee
Warden
O.L Luther Unit (P2)
- c. Texas Department of Criminal Justice
c/o Bryan Collier
TDCJ Executive Director

Service was perfected to the above Defendants through their Attorneys of Record for Service:

Todd Disher
Attorney In Charge
Office of Attorney General of Texas
209 W 14th, 8th Floor
Austin, TX 78701

Leah Jean O'Leary
Office of the Attorney General
Law Enforcement Defense Division
P.O. Box 12548 Capital Station
Austin, TX 78711-2548

CERTIFICATE OF MAILING

Whereby their signatures below, Plaintiffs do hereby certify/declare that the foregoing document was delivered to the United States Post Office for processing (U.S. First Class postage, pre-paid).


Pursuant to Fed. R. App. P. Rule 25 (a)(2)(A)(iii), "Mailbox Rule," Pro se documents filed at the time they are placed in the institutional mailing system for processing.

INMATE DECLARATION


We, the Plaintiffs listed below, being over 18 years of age, of sound mind, capable of making this declaration due to the facts that we: suffer from and/or experience(d) one or more of the conditions described; attended consultations with qualified medical and other professionals; having been trained by medical personnel to recognize and treat complications due to illness/heat/cold; having studied materials listed under Fed. R. Civ. P. Rule 902; through our personal observations; and due to belief and empirical knowledge that the facts stated above; pursuant to 28 U.S.C. § 1746, do hereby declare under penalty of perjury that the foregoing is true and correct from personal knowledge.

Executed on January 6, 2020

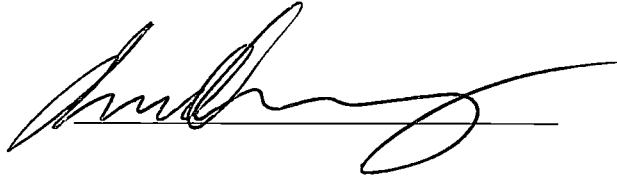
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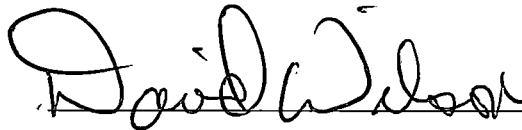
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DAVID WILSON, Pro Se
TDCJ ID# 01648044
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1800 Luther Dr.
Navasota, TX 77868-4714



NOTE: The addresses of Plaintiffs Sain, Capuchino, Cummings, Gullett, and Wilson should be revised to match their current housing:

Pack Unit (P1)

Pack Unit (P1)

2400 Wallace Pack Rd.

Navasota, TX 77868-4567

Attachment A

Fifth Circuit Stay Submission

No. 19-20695

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

JOHN SAIN, et al.,

Plaintiff—Appellee

v.

BRYAN COLLIER, et al.,

Defendants—Appellants

**On appeal from the United States District Court
Southern District of Texas, Houston Division
Civil Action No. 4:18-cv-04412**

**APPELLANT’S MOTION REQUESTING THE COURT TO STAY
FURTHER PROCEEDINGS IN APPEAL**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Appellants, John Sain, *et al*, pursuant to Fed. R. App. P. Rule 27 presenting, for the Court’s consideration, their request for a Procedural Order wherein Appellants request the Court to STAY FURTHER PROCEEDINGS IN APPEAL until entry of Final Judgement in the District Court. For good cause Appellants will show as follows.

BACKGROUND

This pending appeal, styled and numbered above, originates from a §1983 class action suit brought by John Sain and other Texas Department of Criminal

Justice inmates challenging the conditions of confinement at the Luther Unit in Navasota, Texas.

The complaint filed in the U.S. District Court for the Southern District of Texas, Houston Division, named multiple parties, including the University of Texas Medical Branch (UTMB), and stated multiple claims including claims under the Americans with Disabilities Act, (ADA), the Rehabilitation Act, (R.A.), and the Eighth Amendment. Doc. 25

On August 30, 2019, the District Court ruled on numerous pending motions and issued its' Memorandum Opinion and Order, stating in relevant part:

- (A) Defendant, UTMB's Motion to Dismiss is Granted, Doc. 120, p. 75;
- (B) Plaintiffs' First Amended Motion For Class Certification is Denied, Doc. 120, p. 75; and
- (C) Defendants' Motion for Summary Judgement is Granted in part and Denied in part, wherein the Court dismissed Plaintiffs' claims under the ADA and RA, but denied summary judgement on Plaintiffs' Eighth Amendment claim, Doc. 120, p. 74.

Pro se, Plaintiffs immediately filed a Notice of Appeal from the Memorandum Opinion and Order, Doc. 126, and a motion requesting leave to proceed on appeal in forma pauperis, Doc. 125, in the District Court.

On October 7, 2019, this Court issued its NOTICE that the appeal had been docketed. By law the Appellants, (Plaintiffs) have until Monday November 18, 2019 to file their brief.

Plaintiffs offer their sincere apologies to the Honorable Court for prematurely filing their Notice of Appeal. Plaintiffs beg the Court's forgiveness and assure the Court that the error was not in bad faith, but rather a by-product of Plaintiffs' inexperience and lack of knowledge. Combined with the problems which continue to escalate in the Luther Unit Law Library, and now at the Pack Unit Law Library, Plaintiff requests for additional law library sessions are being denied by the Access to Courts Supervisor who cites to a per se rule that they are permitted 10 hours a week access to the law library with an additional 30 minutes per day of extra time for a total of 12.5 hours maximum time allowed per week. No consideration is being given to their filing deadlines, the complexity of their case, or their need to confer with each other.

Additionally, the Defendants relocated Plaintiffs to the Pack Unit on October 30, 2019. This in itself was very disrupting to continuing legal work, especially since their in-progress work remains at the Luther Unit and a method of transfer of these documents from the Inmate Legal Assistants has not been devised. *See*: 4:18-cv-04412, Doc. 145.

Since Plaintiffs relocated to Pack, production of legal work has come to a near stand-still as lack of in-progress work, Inmate Legal Assistants, ability of the Plaintiffs to confer and work together is not possible, and as noted above about the Luther Unit, First Amendment Rights are more restricted than prior to relocation. See attached, Response To Order To Show Cause For Stay Pending Appeal, filed with the District Court in Houston. Attachment A.

However, Plaintiffs Notice of Appeal was filed prematurely, and therefore, Plaintiffs now move the Court to stay the proceedings in the Appeal until the entry of the Final Judgment in the case pending before the U.S. District Court.

ARGUMENT

The Plaintiffs filed their Pro se Notice of Appeal in good faith, believing that the Courts' Orders constituted a final decision for the respective party and claims. Plaintiffs only learned of their mistake when the District Court issued its Order Granting Plaintiffs' Application to Proceed In Forma Pauperis. Doc. 138. Plaintiffs now understand that, because their complaint named multiple Defendants and claims, the District Courts' interlocutory orders dismissing some but not all claims or parties does not constitute a Final Judgement, Fed. R. Civ. Proc. 54(b), and thus, these Orders are not ripe for appeal at this time.

Plaintiffs, who are proceeding Pro se, and are without expertise in the field of law, have erred and filed their Notice of Appeal prematurely. Plaintiffs assure the Court that they have not acted in bad faith and offer their sincere apologies for the inconveniences the error has caused.

Plaintiffs beg the Court to consider their indigency and recognize the financial hardship which would be placed upon them if they were to be subjected to dismissal of their appeal for a lack of jurisdiction due to the premature filing.

Plaintiffs respectfully request the Court to give consideration to staying the appellate proceedings until the entry of the Final Judgment in the District Court. Thereby, allowing the appeal to become effective on the date of the entry of the Final Judgment. *See, Estrada v. City of San Denito, TX*, 397 F. Appx. 4 (CA 5 Tex. 2010), “Premature appeal from Order of District Court, dismissing complaint, but not dismissing action so as to grant plaintiff right to correct complaint’s deficiencies would become effective on date of entry of final judgment” *Id. See Also*: Fed. R. App. P. Rule 4(a)(2). “A notice of appeal filed after the court announces a decision or order- but before the entry of the judgment or order – is treated as filed on the date of and after the entry.” *Id.*

Furthermore, by staying the appellate proceedings, the civil action in the District Court would be permitted to proceed to a final decision without undue delay

and this Honorable Court would not be unduly burdened with piecemeal appeals from a single action.

PRAYER FOR RELIEF

FOR REASONS STATED ABOVE, Plaintiffs pray this Honorable Court will forgive their error, and issue an Order staying the appellate proceedings in Fifth Circuit Case Number 19-20695 until such time a Final Judgment is entered by the U.S. District Court in Case Number 4:18-cv-04412, where after Plaintiffs will be allowed to raise any issues which might arise during the civil proceedings.

WHEREFORE, Plaintiffs pray the Court to Grant their motion and provide the relief requested or any other relief the Court may on its own accord deem to be appropriate.

Respectfully Submitted,

Dated: January 6, 2020

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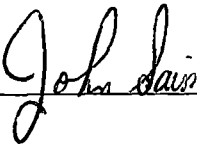
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Certificate of Compliance

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 1,547 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, Times New Roman font (with 12-point Times New Roman font for the footnotes).

Executed on January 6, 2020

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Navasota, TX 77868-4714



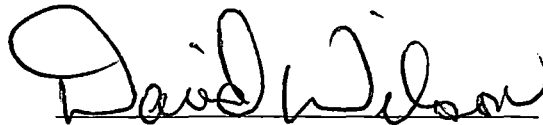
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